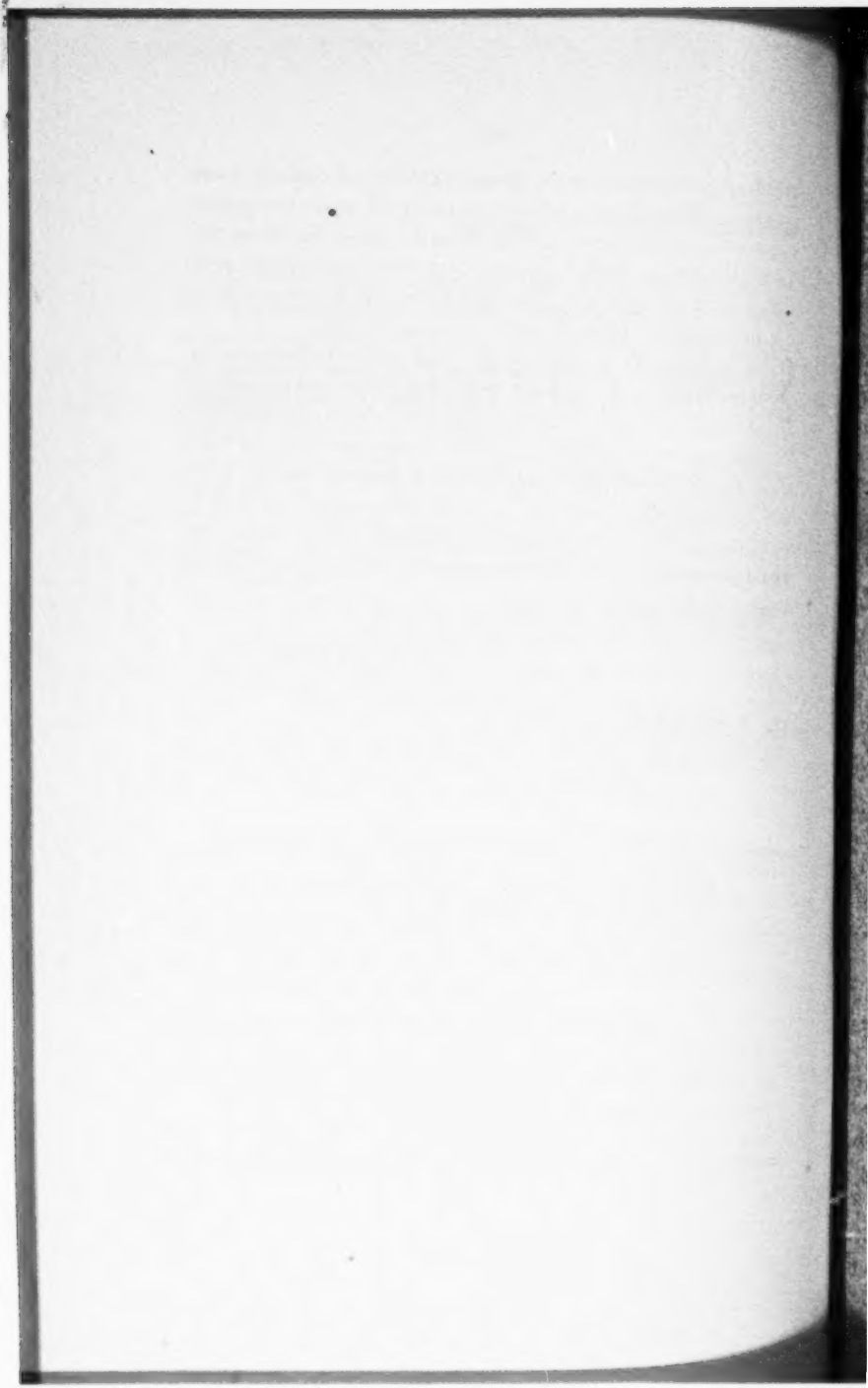

No. 181.

Petition for Rehearing.

OFFICE SUPREME COURT OF U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

The United States Trust Company of New York and C. W. Smith,
Appellants,
vs.
The Territory of New Mexico,
Appellee.

No. 181.

PETITION FOR RE-HEARING.

C. N. Sterry,
Solicitor for Appellants.

E. D. Kenna,
Robert Dunlap,
of Counsel.

DeMass Bowers, Law Printer, Los Angeles, Cal.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

The United States Trust Company of New York and C. W. Smith, Appellants, vs. **The Territory of New Mexico,** Appellee.	*No. 181.*

PETITION FOR RE-HEARING.

Having carefully examined the opinion of this Honorable Court in the above cause, we think that with propriety, we may ask the Court to consider whether this case, be not one, in which it will be proper, to grant a re-hearing to the appellants, upon the grounds hereinafter stated:

FIRST.

I.

THE RECORD IN THIS CASE CLEARLY DISCLOSES; THAT THE PETITION IN INTERVENTION WAS NOT FILED, OR INTENDED TO BE FILED, IN ACCORDANCE WITH THE TERMS OF EITHER DECREE, OR TO ENFORCE THE PROVISIONS OF EITHER OF SUCH DECREES; WAS NOT, AND WAS NOT INTENDED, TO PRESENT ANY CLAIMS AGAINST THE PURCHASERS, OR THE PROPERTY; THAT THE TAXES DESCRIBED IN THE INTERVENING PETITION WERE NOT INCLUDED IN THE TAXES COVERED BY ANY TERMS OF THE DECREE OF CONFIRMATION. THE OPINION FILED MAKES IT CLEAR, THAT THIS COURT, IN DECIDING THE CASE, ERRONEOUSLY, THROUGH MISUNDERSTANDING OF THE RECORD, DETERMINED THAT THE INTERVENING PETITION WAS FILED TO ENFORCE THE PROVISIONS OF THE DECREES, AGAINST THE PURCHASERS, AND THE PROPERTY, IN RELATION TO TAXES SPECIFICALLY COVERED BY THE TERMS OF THE DECREE OF CONFIRMATION.

It was claimed by appellants, upon the hearing before this Court that this intervening petition should either have been dismissed in the District Court, upon the motion made therefor, the evidence in support of it, or that the plea in abatement should have been sustained, upon the several grounds stated in the motion, and the plea (Pr. Tr. pp. 107 to 129). The first ground of the motion and plea were based upon the fact that prior to the reinstatement of this case, under the mandate of this Court, the receiver had made his final accounting, and had been discharged, and that at the time of the reinstatement of this case, he had no funds in his hands belonging to the estate, or which could be applied to

the satisfaction of any claims, stated in the intervening petition.

The written argument made by appellants, in support of this proposition, is found upon pages 47 to 56 of their brief filed in October last, our contention therein being in substance the proposition above stated.

In answer to this proposition it is said in the opinion:

> "That the receiver had been discharged before such mandate was filed, or final proceedings had, is immaterial, as the grantee of the purchaser (the present owner of the property) had made itself a party to the record by coming in and praying for the publication of a notice to cut off claims."

This answer of the Court is clear evidence, to our minds, that the Court, in passing upon our claims, entirely failed to understand the record, in respect to the matter above stated, as the record *conclusively* shows, that this intervening petition was not filed, or attempted to be filed, as a claim against the purchasers, or the property purchased, or to enforce any claim provided for in either of the decrees, or pursuant to the provisions of either of them, concerning any taxes mentioned in the decree of confirmation.

If the Court will read the following statement of the facts in this matter, as they appear upon the record, it will be unable to reach any other conclusion, than that it misunderstood the record in this respect, when it rendered its late decision.

The final decree in this case was entered on the 10th of April, 1896 (Pr. Tr. p. 29), and it provided, among other things: that upon a sale of the property the purchaser, or purchasers, should, as part of the consideration and pur-

chase price of the property, in addition to the amount bid (the italics are ours)—

> "pay, satisfy and discharge * * * any indebtedness and obligations or liabilities * * * legally contracted or incurred by the receiver before delivery of possession of the property sold, * * * also by any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof. * * * in the event that said purchaser or purchasers *shall refuse, after demand made*, to pay any such indebtedness, obligations or liabilities, *the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this court to have such claims enforced against the property aforesaid, in accordance with the usual practice in relation to claims of a similar character;* and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the Court reserves the right retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligation or liabilities within thirty days after service of a copy of such order." (Pr. Tr. pp. 39, 40.)

The foregoing provisions were all of the provisions relative to the presentation of claims, which anyone might desire to present, *pending the time* intervening be-

up that they had made the purchase *without notice of the existence of such claimed taxes* and thus to eliminate one possible point of dispute or discussion in any later proceeding. Affiant further states that as a final result of the said discussion and by agreement of the counsel present there was inserted in the said order of sale such a provision as he asked, in language drafted by Mr. Kenna, approved by affiant and assented to by the purchasers present, that clause being in the words following, to-wit: 'including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid.'" (Pr. Tr. pp. 125 to 126, also Appellant's Reply Brief pages 6 to 9.)

From this affidavit it clearly appears, that the taxes *then levied* were the only taxes brought to the attention of the Court, and concerning which its action was invoked.

At the same time and at the same hearing Mr. Clancy made another affidavit, which was considered, and which contained among others the following statements (the italics are ours):

"Affiant denies, as alleged by said Sterry in his said affidavit, that in 1892 the assessor of Valencia county assessed the right of way of the said railroad company and its station grounds in said county at the aggregate sum of $327,103; but avers that the said assessor, on the assessment roll for 1892 did assess the "total value of right of way" at the amount aforesaid, and that the said assessment was based upon a return made by the said Sterry on the 19th day of April, 1892, in which he stated the full value of the said right of way and of the superstructure thereon, composing the road bed, track and railroad of said company, together with the telegraph line erected on said right of way, at the sum aforesaid; and that the said assessor assessed the grounds for station buildings and for other purposes together with the improvements thereon, at the sum of $11,782 and that such assessment was based upon the same return made by the said Sterry. * * * *

Affiant admits, as is shown by the records of this Court, that on the 10th day of June, 1897, the intervening petition in this proceeding was filed; and affiant states in connection herewith, that the additional assessments set up and referred to in said intervening petition, copies of which were filed therewith as parts thereof, *were made by the collector of Valencia county on or about the 7th day of June,* 1897; that the said additional assessments were made by the said collector because there had been no assessment made for either of the years from 1892 to 1896, of the property described and set forth in the said additional assessments, *especially as to the improvements upon the land embraced within the limits of the right of way of the railroad company,* the previous assessments having been in terms only *of the 'total value of the right of way;'* and their validity having been disputed on that ground as well as others, by the said Sterry; and also for the purpose of *discriminating* between *the improvements on the right of way* where the same runs over what was public domain of the United States when the right of way was granted and the improvements upon the right of way where it runs over land which was held in private ownership at the time of said grant.

Affiant further says that at the time of the making of said additional assessments, he directed the said collector to give notice of the same to the said Sterry and to the receiver of the railroad company, and also as he now recollects to the counsel of the United States Trust Company, and he has been assured by the said collector that the said notices were mailed as directed by affiant."

(Pr. Tr. pp. 117 to 125.)

Upon this hearing, after a full discussion, the Court entered its decree of confirmation, containing, among the provisions as to claims that the purchasers should pay, in addition to the purchase price bid, a provision that they should also pay—

"any taxes which may finally be adjudged to be a lien

upon the property sold under the decree aforesaid." (Pr. Tr. p. 47.)

While this language was broad enough to include taxes, that might be levied any year after the sale, it necessarily was limited to embrace *only such taxes* as were at that time actually in existence upon the records of the county, and at that time a lien on the property prior to the mortgage that was foreclosed; being the taxes, that were under discussion before the Court, and not taxes levied for the *first time* a month and three days afterwards.

This Court, in determining the scope of this clause in the decree, considered (as it should) one of the affidavits, filed by Mr. Clancy, as shown by the following excerpt from its statement of the facts:

> "According to an affidavit filed in the case this clause was entered at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to."

All the matters presented by either affidavit, at the hearing of the motion to dismiss, were proper to be considered by the Court below, and this Court, for the purpose of showing that the broad language of the final decree, with reference to "any taxes," was limited to certain taxes, and was not intended to apply to future taxes, as will be seen from the authorities.

This Court, speaking through Chief Justice Waite, in the case of Barnes v. C. M. & St. P. Ry. Co. (122 U. S. 1), said, in reference to the construction of decrees:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construc-

tion so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. R. R. Co., 70 U. S. 3 Wall. 704 (18: 247)."

See also:

S. M. etc. Co. v. St. Paul, etc. R. R. Co., 12 U. S. App. 320.

Humphries v. Third Nat'l Bank, 43 U. S. App. 698.

As stated in section 123 of Black on Judgments:

"Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the Court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended significance made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms."

It must be conceded that Mr. Clancy, was perfectly familiar with the terms and conditions of the final decree, in foreclosure, as he stated that he was afraid they were not broad enough for his purpose, and of the terms and conditions of the decree of confirmation, which he helped to shape. While the entire matter was fresh in the minds of all parties, a month and three days later, Mr. Clancy, sincerely believing in his theory, that the superstructure of the railroad, upon its right of way, was separate and distinct, from the right of way itself, and that the decision of the Territorial Supreme Court holding adversely would be reversed by this Court, rightly assumed *upon such theory*, that such superstructure, had not been assessed for the years 1892 to 1896, not being included in the assessments of the right of way, which

tween the *sale* of the property and the *delivery* of it to the purchasers; after the delivery of the property, when sold, claims were to be presented in accordance with a notice to be published by the receiver; no provision was made in this decree, or the decree of confirmation, for the presentation of claims to the receiver, or the Court, for distribution of any of the proceeds arising from the sale.

The property ordered to be sold, under this decree, was sold on the 3rd day of May, 1897, a little over a year, after the entry of the final decree; on the 4th day of May, 1897, the sale having been reported by the Special Master, an application for a confirmation of the sale was made to the Court. At this hearing, there were present, not only the appellants, and other parties, but also the appellee, by its solicitor, Mr. Clancy, who was present, for the express purpose of having inserted in the decree of confirmation, a provision covering taxes which were *then* in dispute, between the receiver and Valencia and Bernalillo counties. (Pr. Tr. pp. 44 to 51, 125 to 127.)

At this point, we desire to call the attention of the Court to certain facts, which it certainly overlooked, then existing within the knowledge of the District Court, and of each of the parties attending this hearing for confirmation, shown by the affidavits filed and considered upon the hearing of the motion to dismiss, together with the record.

From 1892 to 1896, inclusive, there had been levied, in Bernalillo and Valencia counties, New Mexico, (the only two counties in that Territory through which the road ran) each year, taxes upon an assessment, by the proper officers,

of the entire "right of way" of the Atlantic & Pacific Railroad, as it ran through each of these counties. These taxes, for 1892 and 1893, the Railroad Company had refused to pay, on the ground that the entire right of way was exempt from taxation, under the Act of Congress creating it; for the subsequent years the receiver had refused to pay for the same reason. Previous to the entry of the final decree a suit had been brought against the receiver, in the name of the Territory, to enforce the collection of the taxes in Bernalillo county, and on the hearing in the District Court, that Court had held, that the superstructure placed on the right of way, was not within the exemption, and was subject to taxation. Upon an appeal from this decision by the appellant, in this case, the Supreme Court of the Territory had held, that the superstructure was a part of the right of way, and that, under the Act of Congress, the entire right of way was exempt, including such superstructure. This case was decided by the territorial Supreme Court on December 18, 1896. Subsequently a supplemental case, was brought by the Territory, to recover taxes not embraced in the first case, and that was decided by the lower Court, in accordance with the decision of the Supreme Court of the Territory, and it was also appealed to the Supreme Court of the Territory by the appellants in this case; on August 20, 1897, the Supreme Court of the Territory affirmed that decision. Each of these decisions, made by the Territorial Supreme Court, were appealed by the Territory to this Court; (where they were subsequently affirmed, 172 U. S. 171); each of these appeals were pending, unheard, and

undetermined, when this hearing for a confirmation of the sale took place.

At the time of this hearing the taxes in controversy, set out in the intervening petition, were, not only *not levied, or in existence*, but were not dreamed of, by either Court, or counsel, as such assessments, and taxes, were for the first time made and levied on June 7th, following, a month and three days later.

At the time of the hearing for confirmation, appellee, by its solicitor then present, stated to the Court:

> That arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the Legislative Assembly of 1897, for the purpose of prosecuting claims against the property sold *for taxes which had been levied for four or five years in said counties*, the validity of which was in dispute, the railroad authorities claiming that the congressional exemption set out in the second section of the Act of Congress of 1866, etc., extended to the property upon which the taxes had been levied.

To more fully show what was then before the Court in this matter we quote from the affidavits of Mr. Clancy, showing exactly what took place, at the time of the hearing of the application to confirm, as claimed by the appellee (the italics are ours):

> "F. W. Clancy, being duly sworn, on his oath says, that since the making of the previous affidavit in this cause he has been served with a copy of an amended motion to dismiss the intervening petition herein, which sets up an additional ground for such motion, said ground being that which is set forth in the third paragraph of said amended motion. Affiant states that at the time of the presentation to this Court of the report of the foreclosure sale in this cause and the asking of

a confirmation of said sale, he attended before the Court for the purpose of having inserted in the order of confirmation a provision that the sale was made subject to the payment by the purchasers of their successors or assigns *of any unpaid taxes which might be adjudged to be a lien upon the property sold;* that at said time there were present Mr. Aldace F. Walker and Mr. Victor Morawetz two of the purchasers at said sale, and perhaps Mr. R. Sommers Hayes, the third purchaser, but of this affiant is not now certain; there were also present Mr. C. N. Sterry and Mr. E. D. Kenna, who was and is, as affiant understands, the principal law officer of the whole Santa Fe system of railroads; that at *said time and place* affiant *stated* that arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the Legislative Assembly of 1897, *for the purpose of prosecuting claims against the property sold for taxes which had been levied for four or five years in said counties*, the validity of which was in dispute, the railroad authorities claiming that the Congressional exemption set out in the second section of the act of Congress of 1866, incorporating the Atlantic and Pacific Railroad Company, extended to the property upon which the taxes had been levied; that a long discussion ensued, in the course of which affiant distinctly recollects that it was urged by some of the gentlemen present that the decree of foreclosure had said nothing on the subject of unpaid taxes and that it was not fair to the purchasers to saddle them with any additional liability in the order of confirmation, to which affiant replied in substance that if the purchasers had been misled or deceived by the decree of foreclosure it was not too late for them to recede from their purchase and refuse to take the property if additional and unexpected burdens were imposed; that in answer to a suggestion made as affiant now recollects, by Mr. Kenna, *that if the taxes were a lien on the property that lien could not be divested by the sale of the property*, affiant answered in substance that in his opinion *this was true*, but he desired to have inserted in the order of confirmation such a provision as he asked so that it would be impossible for the purchasers at any future time to set

he admitted, had been properly made, notwithstanding the fact that such assessments under the laws of New Mexico carried with them all improvements placed upon the right of way as being part of it (See Sec. 2807, Laws of New Mexico, page 156 of our Brief).

(That such superstructure was a part of the right of way itself was subsequently determined by this Court in the Bernalillo county cases).

Acting solely upon this theory, Mr. Clancy, on the 7th of June, a month and three days, after the decree of confirmation was entered, and some days after the deed was actually executed, from the Master to the purchasers, procured the collector of Valencia county, to assess the superstructure, over the entire right of way in Valencia county, as an independent piece of property, upon his theory, that it had escaped assessment and taxation, during those years by reason of not being covered by the assessment and taxation of the right of way. The entire matter being fresh, as stated, in the minds of all parties, Mr. Clancy perfectly understood, that the decree of confirmation did not, and was not intended, to cover any such taxes, and that such claim could not be enforced against the purchasers of the property, having come into existence over a month after the sale and its confirmation. He knew that so far as either of the decrees, had imposed upon the purchasers, the burden of paying any sums in addition, to the purchase price, to cover claims mentioned in these decrees, that the decrees provided, the specific and only way, in which such claims could be presented to, and enforced against the purchasers, by an intervention in that suit, which in any

proper case could be had *as a matter of right* without leave from the Court, in the manner provided for in the decree; he knew that prior to the delivery of the property to the purchasrs, if he desired to hold the purchasers, he should present any such claims to them, and upon their refusal, by giving to them 15 days notice of his intention to file such claims in this cause, he could file the same, as a matter of right, without leave of Court. He knew that the property had been sold, and the names of the purchasers who bought, yet when he came to instruct the collector, as to whom he should notify, of the fact that he had made these additional assessments, in order that such party might appeal, under the provisions of section 4056 (*post*), he instructed him (according to his own affidavit) only to notify the receiver and his solicitor, and the United States Trust Company, omitting from such instructions the names of the purchasers, whom he had no thought of molesting concerning these particular taxes, and whom he knew would have no reason to appeal. Mr. Clancy also knew, that no provisions had been made covering the payment by the receiver, out of the funds received upon the sale, of any claims, of the character of those held by him, and that, to enforce such claims against such funds, he would have to procure an order of the Court to intervene by a proceeding directly against the receiver, and the only other party interested in the funds received from the sale, to wit, the United States Trust Company. Knowing these things, the appellee, ignoring the provisions of the decree, with reference to enforcing claims against the purchasers, presented the intervening petition in controversy to the Judge at Chambers, on the 10th

day of June, 1897, and procured express leave to file it. This is shown by an order entered at that time (the italics are ours):

> "Upon reading and filing the intervening petition of the Territory of New Mexico, and after hearing F. W. Clancy, Esq., solicitor for the said intervening petitioner, *it is ordered by the court* that the said Territory of New Mexico be and *hereby is given leave to intervene herein* and that *the parties hereto who have appeared herein* are required to show cause before the judge of this court at the court house, in the county of Bernalillo, on the 15th day of June, 1897, at ten o'clock in the forenoon of said day, why the prayer of said petitioner should not be granted, service of copies of said petition and of this order to be made not later than the 10th of June, 1897, upon the solicitor for complainant, the solicitor for the Mercantile Trust Company and the solicitor for the said receiver, such service to be made in accordance with the usual practice of this court.
>
> N. C. COLLIER, *Judge.*"

(Pr. tr. p. 57.)

By such order, appellee was given leave, to intervene, in the cause for the purpose of presenting a claim, not against the purchasers, but against the receiver, and the funds in his hands, for taxes which were levied only three days prior to the obtaining of the order, but a month and three days after the sale of the property. The appellee, and the Judge having all of these matters then fresh in mind, and understanding, that this intervening petition, was not to enforce any provision of the decree, had the order provide for a service of it, not upon the purchasers, who were then solely interested, but upon the parties who had theretofore appeared in the cause, and who were interested only in the distribution of the funds, and these parties, and these parties

only, were required to show cause why the order should not be granted, and were required to do this in five days, instead of fifteen days, which was given by the decree, when a claim was to be filed against the purchasers.

In this connection it should be remembered that the final decree provided that claims sought to be enforced against the purchasers, and the property, *after the sale and prior* to the *delivery* of the *possession of* the *property* to the purchasers were to be presented to the purchasers, and upon their refusal to pay, then upon a *fifteen* days' notice to the purchasers, the party having such claims could *as a matter of right, without leave of Court,* file his petition in the Court in this cause for the purpose of having the claims adjudicated. *After the delivery of the property,* then the claimants were to present their claims in accordance with the notice to be published by the receiver.

This petition was filed on the 10th of June, 1897 (Pr. tr. p. 50), the property delivered to the purchasers, or rather to their assignee, on the 22nd of June, 1897 (Pr. tr. p. 115), and as the notice to creditors was not published until April 3, 1899 (Pr. tr. p. 105), it is made still more apparent, that the petition, was not attempted to be filed for the purpose of enforcing those provisions of the decree which appear on page 40 of the record; neither was the petition filed for the purpose of presenting claims under the notice to creditors, published more than a year afterwards. It seems to us from the facts above stated that there cannot be the slightest question but that the taxes mentioned in the decree of confirmation were the taxes then standing on the records of the county as an apparent lien upon the property sold,

and not the taxes that were then unthought of and subsequently levied upon assessments that were as yet not made. That this Court in its decision was entirely misled in respect to this matter (if our contention be correct) is clear from its statement of facts.

In the statement of facts preceding the opinion it is said (the italics are ours):

> "The order of confirmation contained substantially the same provisions respecting payment of obligations as the decree, and added 'including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid.' According to an affidavit filed in the case this clause was entered *at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to.*"

In that portion of the opinion referring to this order of confirmation, and evidently based on this statement, the Court uses the following language (the italics are ours):

> "Neither can the Santa Fe Company claim that it was misled in any way as to its liability for *these taxes,* for not only by the terms of the decree was the sale to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, but also on the confirmation of the sale and before it took title from the purchasers at such sale the order specifically included within the obligations which must be assumed *any taxes* which might 'finally be adjudged to be a lien upon the property.'"

A portion of section 4057 of the Revised Statutes of New Mexico (2849 in Appendix of Brief) reads as follows (the italics are ours):

> "Sec. 4057. Every tax levied according to the provisions of this act shall have the force and effect of a

judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon *from the date of the levy thereof* * *"

In our brief, filed in October last, we attempted to impress upon the Court the fact that these taxes in controversy under this statute, were for the first time a lien upon the property sold on the 7th of June, after its sale, confirmation and conveyance, and hence not taxes mentioned in the decree (Brief, pp. 69 to 72), citing:

Lyon v. Alley, 130 U. S. 177.
Cooley on Taxation (2nd ed.), pages 305, 352, 353.
Miller v. Anderson et al., 1 S. Dak. 539.
Creighton v. Manson, 27 Cal. 614.
State v. Newark, 42 N. J. L. 38.
Howell v. Essex Co., 32 N. J. Eq., 672.
Garretson v. Schofield, 44 Iowa 37.
Otoe Co. v. Mathews, 18 Neb. 466.
Meyer v. Burritt, 60 Conn. 117.
New England L. & T. Co. v. Young, 81 Iowa 732.
Philadelphia v. Greble, 38 Pa. St. 339.
Board of Education v. Old Dominion Iron etc. Co., 18 West Va. 441.
Kentucky Central R. R. Co. v. Commonwealth, 92 Ky. 64.
Tousey v. Post, 91 Mich. 631.
Anderson v. State, 23 Miss. 459.

In conclusion upon this subject, we desire to say that under the authorities cited in our brief on pages 50 to 55, inclusive, the discharge of the receiver, ended the right to further proceed, with this intervening petition, it not being

filed to enforce the terms of the decree concerning claims to be paid by the purchaser, but to enforce claims against the receiver as such officer and the funds under his control. The cases of N. Y. & W. U. Tel. Co. *in re* v. Jewett, 115 N. Y. 166, and Texas and Pacific Ry. Co. v. Watson et al., 24 S. W. Rep. 952, are precisely in point. In addition to those cases, see decision of U. S. Circuit Court of Appeals, 9th Circuit, in the case of Thompson v. Northern Pacific Ry. Co., 93 Fed. 384; also, Sloan v. Central Iowa Ry. Co., 62 Iowa 728, and the other cases cited on pages 50 to 55 of our Brief.

II.

In passing upon the motion to dismiss, and the plea in abatement, the Court in its opinion, says:

> "The filing of the intervening petition and the final adjudication thereon were in time. It is true the petition was not filed until after the sale had been confirmed and the master's deed executed, and that by the decree of confirmation the receiver was directed to then turn over the property to the purchasers. It may be also conceded as generally true that a retention by a receiver, after the time for the delivery of the property in his hands, is as agent of the purchasers. (*Very* v. *Watkins*, 23 How. 469, 474.) But the filing of the petition, as well as the mandate from this court, was within the time expressly named in the decree, as follows:
>
> > 'Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this Court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance.'
>
> Indeed, the petition was filed while the prop-

erty was still in the hands of the receiver, and that would seem to bring the action of the intervenor within the terms of the first clause of the quotation just made. At any rate, everything in the district court, even its final adjudication, was before October 23, 1899, the time fixed in the notice for the cutting off of claims against the property given at the instance of the grantee of the purchasers, to wit, the Santa Fe Pacific Railroad Company."

The Court, in making this statement, labored under an evident misapprehension of our position, as we did not intend, either in our brief, or oral argument to say that the intervening petition was not filed in time. What we did intend to say, was: that no notice of these claims was ever given to the purchasers, or their assignee, prior to its filing, and that neither the purchasers, or their assignee, ever refused any payment of any claim presented by the intervening petition; that consequently it could not be sustained, as an intervening petition filed under the terms of the decree. Upon the hearing of the motion to dismiss, there was presented in support of this point an affidavit of Mr. Sterry, as follows:

"C. N. Sterry, being first duly sworn, deposes and says: That the taxes claimed to be due by the intervening petition herein was never presented to, or the payment thereof demanded from the purchasers of the property sold under the decree in this cause, or their assigns, and that neither the purchasers nor their assigns have ever refused any payment of such taxes or any part thereof upon any demand or claim for the same upon them, or either of them by the Territory of New Mexico. That no notice was ever given to the purchasers, or their assigns that any intervening petition would be filed in this cause for or on behalf of any such taxes prior to the filing of the same, except that F. W. Clancy, at the time the confirmation of the sale

was pending, notified the purchasers, their solicitor and the Court, that he had been employed by Valencia County to collect taxes claimed to be due, and that he wished the decree of confirmation of the sale of the property so formed that if he obtained a valid judgment for such taxes it would be a lien upon the property sold in the hands of the purchasers. That the possession of the property sold under the decree was delivered by the receiver to the assigns of the purchasers, the Santa Fe Pacific Railroad Company on July 1st, 1897. And further affiant saith not." (Pr. Tr. p. 116.)

In our brief, and argument, we intended and attempted, to say to the Court, that so far as the purchasers, and their assignee, were concerned, this decree created a contract between them and the Court, by which the method of presenting claims, which they were to pay, as part of the purchase price, was definitely fixed, and regulated, and that such method could not be changed, without the consent of the purchasers themselves. (See argument in our brief, page 46 and commencing 2nd paragraph, p. 58, and ending 5th paragraph, p. 65).

We cited in support of this proposition the following authorities:

Kneeland v. American Loan Co., 136 U. S. 89.

Davis v. Mercantile Trust Co., 152 U. S. 594.

Central Trust Co. *et al.* v. Wabash, St. L. & P. R. R. Co. *et al.*, 30 Fed. 332.

Fidelity Ins. T. & S. Co. v. Norfolk & W. R. R. Co., 88 Fed. 820.

C. & O. R. R. Co. v. McCammon (C. C. A. 7th Cir.), 61 Fed. 774.

Farmers' Loan & Trust Co. v. Central R. of Iowa, 7 Fed. 537.

Davis v. Duncan, 19 Fed. 477.
Houston & T. C. R. R. Co. v. Crawford, 88 Tex. 277.
Hicks v. Railroad Co., 62 Tex. 41.
Beach, Rec., Par. 735.
C. T. Co. v. St. L. A. & T. R. R. Co., 59 Fed. 385.

We respectfully submit that the portion of the decree, quoted in the above excerpt, from the opinion of the Court, has no application to any proposition that was before the Court. This intervening petition, was either filed under the order of the Court hereinabove quoted, or else attempted to be filed under the provisions of the final decree, and was not attempted to be filed under any notice to creditors made after the delivery of the property; if the intervening petition was attempted to be filed under the terms of the decree, the Territory failed to bring itself within the requirements of such decree, and therefore the petition should have been dismissed, on the ground that neither the Court, or the Territory, could change the terms of the decree, without the consent of the purchasers; if in such case it is a fact, that the purchasers were notified of the claims for these taxes, (as assumed by this Court), at the time of the confirmation of the sale (a proposition which we strenuously deny), such notification could not take the place of the express provisions of the decree; if filed under the order of the court and not under decree then it should have been dismissed after the discharge of the receiver.

SECOND.

WE RESPECTFULLY SUBMIT THAT THIS COURT IN DETERMINING THAT ITS FORMER DECISION, WAS A CONCLUSIVE ADJUDICATION OF THE RIGHT OF THE COLLECTOR, TO MAKE THE ASSESSMENTS, AND LEVIES, SET OUT IN THE INTERVENING PETITION, MISUNDERSTOOD OR OVERLOOKED THE RECORD BEFORE IT, UPON THE FORMER HEARING, AND THE RECORD BEFORE IT UPON THIS HEARING.

The first paragraph of the intervening petition filed in this cause stated the jurisdictional facts, which gave to the collector of Valencia County his only possible authority to make the assessments, and levies, in controversy, which are in the subsequent paragraphs of the petition fully set out. For the purpose of convenience, we here copy this first paragraph, of the intervening petition (the italics are ours):

> "Certain property of the Atlantic & Pacific Railroad Company was *omitted in the assessment of taxable property within the county of Valencia in the Territory of New Mexico for a series of years beginning with the year* 1892 *and ending with the year* 1896, *and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners,* the collector of taxes in said county, after the tax-list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth."

(See p. 30 Tr. filed Sept. 20, 1897; p. 51 Tr. filed Oct. 27, 1900.)

The allegations contained in this first paragraph were not only *material,* but were *absolutely necessary,* in order to show, that the collector of Valencia County, had authority to enter upon the tax roll of 1896 the assessments, and levies, alleged in the intervening petition to have been made and entered by him for the years 1892 to 1896 inclusive. This will be seen by reading the statutes, which for convenience we here copy, being sections 4055 and 4056 of the Compiled Laws of New Mexico, Compilation of 1897:

"Sec. 4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been assessed and paid in former years charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

Sec. 4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as 'additional assessments'), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

To this intervening petition appellants, on the 30th of September, 1899, (having by leave of court withdrawn those previously filed on June 23, 1897), filed in the District Court, their pleas in bar, setting out in substance, among others, the following facts:

That in each of the years 1892 to 1896, inclusive, the *identical* property, alleged in the intervening petition, to have been assessed by the collector, was under another, and broader description, assessed by the County Assessor, upon the several assessment rolls, for each of those years, at the time required by law, in each year; that the taxes levied in each of said years, in Valencia County, were duly and legally extended, against each of such assessments, at the proper time in each year, so that the property described in the intervening petition as property which had escaped assessment for each of those years, was property which had been *actually* listed upon the assessment rolls, for each year, and duly assessed by the assessor, before the rolls were returned to the County Commissioners, and against which the taxes levied were duly extended, and not property, which had been omitted from such rolls in each of said years, or in any one of them, as alleged in the intervening petition. That the taxes levied against each of such assessments, were still standing on the tax rolls, unpaid and uncancelled. That the collector in entering said property upon the tax rolls of 1896, for assessment and levy, entered it, upon such tax rolls on June 7, 1897, while the assessment roll, of that county, for the year 1897, was still in the assessor's hands. (Pr. Tr. pp. 151 to 212, inclusive.) See our Brief, filed in October, pp. 90 to 100.

The facts thus pleaded, disclosed upon their face that the collector, had no jurisdiction under the statutes quoted to make either of the assessments, or levies, set out in the intervening petition, and hence each of such assessments, and levies, were void, as the superstructure so assessed, being determined by this court, to be a part of the right of way itself, was necessarily, under the provisions of section 2807 of the Laws of New Mexico, (see appendix of our brief), included in the assessments made of the right of way by the county assessors.

The pleas in bar stating these facts, were set down for argument, and upon argument the facts referred to (their truth being admitted) were held, insufficient in law, to constitute any defense, to the assessments and levies, set out in the intervening petition, or to show, that the collector, in making the assessments referred to, and extending the levies of taxes thereto, acted without jurisdiction. (Pr. Tr. pp. 288 to 289.)

Upon appeal to the Supreme Court of the Territory of New Mexico this ruling was affirmed (Pr. Tr. p. 316, 322).

If these facts constituted a bar (as was, and is claimed by us) to the right of recovery on the part of the intervenor, they had to be set out in pleas, as they could not have been stated in an answer.

Farley v. Kittson, 120 U. S. 303.

U. S. v. California & O. Land Co., 148 U. S. 31.

Upon the hearing of this appeal from the decision of the Supreme Court of the Territory by this Court, one of the most important propositions presented by the appellants, in their brief, and upon oral argument, was in substance:

That the collector of Valencia County acted without any jurisdiction, in making the assessments of the property assessed by him, for the years 1892 to 1896, upon the tax rolls of 1896, and acted without jurisdiction, in extending against each of such assessments the levy of taxes for each of the years and therefore no recovery could be had upon the intervening petition. (See appellants' brief, pages 85 to 100; reply brief, pages 17 to 20.) This proposition was based entirely upon the facts stated in these pleas which by the lower Courts had been held insufficient in law. In deciding this case, on January 6, 1902, this Court refused, to pass upon the proposition above stated, or any of the questions involved in it, for the following reasons, stated in the opinion as follows (the italics are ours):

> "The District Court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this Court of such order is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made but also against those which might have been made. (*Cromwell v. County of Sac.*, 94 U. S. 351, 352; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 618.) We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified. * * * There was no invalidity in the fact of additional assessments. Indeed, the claim in the petition was wholly for taxes based upon additional assessments for prior years, and when this Court adjudged that that petition upon its face showed a tax claim against the property, *it was an adjudication in favor of the validity of such additional assessments.*"

In other words, this Court refused to consider this proposition, because it believed, that in the former appeal it either had, or might have considered and disposed of it.

These reasons make it clear, to our mind, that the learned Justice, delivering the opinion, and this Court, misunderstood, not only the present record, and our argument upon it, (so far as the proposition above stated is concerned,) but also the record, that was before this Court, at the time of its former decision, and the possible questions presented by it for the determination of this Court; that through such misunderstanding appellants have suffered an injustice that otherwise would not have occurred. We therefore desire to call attention, to each of these records so far as this matter is concerned, as follows:

The intervening petition in this case, was filed in the District Court on the 10th day of June, 1897, and on the 23rd day of the same month, the appellants filed in that Court, pleas in bar to this intervening petition, and to each claim for taxes for each year. These pleas in bar, in substance set out the same facts as were alleged in the pleas in bar, above referred to (filed on the 30th of September, 1899) except that at that time, it not being known that the collector, entered these assessments on the tax rolls of 1896, in the year 1897, no facts concerning that matter were set out in those former pleas. (See pages 32 to 77 of original Tr. filed Sept. 20, 1897; present Tr. pp. 58 to 103.)

These five pleas, were set down for argument, and while argued to the District Court, the District Court refused to entertain, or consider them, for the reasons stated in its order, which for convenience we here copy:

"The said matter coming on to be heard upon the question of the sufficiency of the joint and several pleas of the United States Trust Company and Charles W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company, to the said intervening petition, for the collection of taxes alleged to be due in Valencia County, after hearing F. W. Clancy for the said intervening petitioner and Karl A. Snyder, Esq., on behalf of the said Trust Company and the said receiver, the Court, being sufficiently advised in the premises, finds that it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas for the reason that the said intervening petition and matters and things therein set up fall within the decision of the Supreme Court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

It is therefore ordered, adjudged and decreed, that the said intervening petition and the same hereby is dismissed. And thereupon the said intervening petitioner prays the Court for an appeal to the Supreme Court of the Territory of New Mexico from the order and decree of this Court. It is therefore ordered by the Court that the said intervening petitioner be and it hereby is allowed an appeal from the said order and decree of this Court to the Supreme Court of the Territory of New Mexico.

(Signed) N. C. COLLIER, *Judge.*"

(Original Tr. pp. 77 to 78; present Tr. p. 103.)

This order of the District Court was affirmed by the Supreme Court of the Territory (Original Tr. filed Sept. 20, 1897, p. 87).

The record which came before this Court, upon the former hearing, consisted of the bill of foreclosure, the order appointing the receiver, the intervening petition, the five pleas

made to it, the order of the Court refusing to consider the pleas, and dismissing the intervening petition, and the order of the Supreme Court of the Territory affirming the order of the District Court (See original transcript, also our brief, p. 72).

After the motion to dismiss the intervening petition was heard and determined (Tr. pp. 107 to 127), the District Court permitted the withdrawal of the pleas, above referred to (which were filed to the intervening petition on the 23rd day of June, 1897), and permitted the plea in abatement to be filed in the place thereof, which was overruled (Tr. pp. 129-130). Then a demurrer was filed, which was heard and overruled (Tr. pp. 130 to 151). And then the pleas in bar filed on the 30th of September, 1899, were filed (Tr. pp. 150 to 212).

It therefore appears, that appellants, at the very first opportunity, presented to the District Court, by proper pleas the facts disclosing, that the jurisdictional facts, set forth in the first paragraph of the intervening plea, (for the purpose of showing the authority of the collector to act), were untrue, and asked the Court to so determine. The District Court refused, after hearing the argument, to pass upon that question, or in any way determine it. Hence when the case was formerly here, and passed upon by this Court, (172 U. S. 171; 174 U. S. 545) there was nothing in the record, that this Court could consider, except the question of the sufficiency of the facts stated in the intervening petition, to constitute valid claims against the receiver. The facts alleged in the five pleas, or either of them, could not, under any possibility, have been presented to, or con-

sidered by this Court. This Court, on that hearing, was bound to hold, that the facts stated, in the first paragraph of the intervening petition, above quoted, were for such hearing true, and that, being true, under the statutes above set out, the collector had the right to make the assessments, and levies, that he did make, if the property, or any of it, was not exempt from taxation, and if the assessments made were sufficient to show a compliance with the statute. The appellants were unable before this Court, at that time, through no fault on their part, to present any question, as to the truth, of the matters (jurisdictional or otherwise), alleged in the intervening petition, and hence this Court, at that time, holding, as it did, that certain of the assessments, were upon property not exempt, and sufficient in description, could not have done otherwise, than to hold, that *prima facie* under the laws of the Territory, the collector had jurisdiction to do the acts alleged to have been done by him. At that time, and on that hearing, this Court would not for a moment, have considered (and did not have the right jurisdiction to consider) any matters alleged in either, or all of the five pleas, in avoidance of the facts stated, in the first paragraph of the intervening petition. In truth it could not possibly have entertained any question, as to the truth of any one of the jurisdictional facts, stated in the first paragraph of the intervening petition.

It must be conceded, therefore, that if, under the former record, at the former hearing, this Court could not have heard any objection to the truth of the matters, set out in that petition, the appellants have now the right to

be heard upon that question, it having, upon proper presentation to the Supreme Court of the Territory, been determined adversely to appellants.

It is barely possible that this Court, in its last decision, (as we believe it actually did in its first) assumed, that the "additional assessments," alleged in the intervening petition, meant assessments additional to assessments of the same property already made, and not (as provided by the statute) "additional assessments" upon the rolls, of property *not* assessed. This would seem possible true, from the following excerpt from the opinion:

> "There was no invalidity in the fact of additional assessments. Indeed the claim in the petition was wholly for taxes based upon additional assessments for prior years."

If the Court meant to say in effect; that its former adjudication determined that the collector had the power to make assessments of any property in addition to assessments which had already been made upon such property, then the Court was wrong, as no such question was possibly before it at the former hearing, or at this hearing. If, on the other hand, the Court simply intended to say that in its former decision it determined that the collector had the right under the statute of New Mexico quoted to make additional assessments upon the tax roll of property entirely omitted from the assessment rolls, when the other jurisdictional facts required by the statute existed, then in such case, as the statute expressly authorized such action, we never have intended at any time to question the right of the collector so to do, if the jurisdictional facts stated in the first paragraph of the intervening petition had been true, instead of untrue.

THIRD.

THE COURT OVERLOOKED THE FACT THAT THE PLEA IN BAR DISCLOSED, THAT THE TAXES IN CONTROVERSY CONSTITUTED DOUBLE TAXATION; THAT THE IDENTICAL PROPERTY HAD THE IDENTICAL TAXES LEVIED AGAINST ASSESSMENTS OF SUCH PROPERTY MADE BY THE COUNTY ASSESSOR AT THE TIME THE COLLECTOR ASSESSED AND LEVIED TAXES UPON HIS ASSESSMENT; THAT IF THE PRESENT ASSESSMENTS AND LEVIES, ARE UPHELD, THE ORIGINAL ASSESSMENTS, AND LEVIES, MADE BY THE PROPER OFFICERS AT THE PROPER TIME, ARE PERFECTLY VALID, HENCE THE SAME TAXES WERE LEVIED TWICE, UPON THE SAME PROPERTY, AND THE TAXES IN CONTROVERSY CONSTITUTED THE SECOND LEVY THEREON.

The facts stated in the pleas in respect to this matter were, in substance, as follows:

That when these additional assessments were made by the collector, there were already taxes levied, in each year, upon assessments, that were just as valid, so far as the description was concerned, as the assessments under consideration, and which included the property assessed by the collector; that these taxes were unpaid, and uncancelled, and so remain to-day upon the books of the county; that if the assessments under consideration were valid, then the assessments that were already upon the rolls of the county were valid; that, under the facts stated, there was double taxation of the same property; that is to say: The same identical taxes were levied for each year twice, upon the same identical property. To determine that the taxes claimed in the intervening petition were valid, and should be paid, was to determine, at the same

time, that the same taxes levied by the proper officers were valid, and should be paid.

The Supreme Court of the Territory answered this proposition, by saying that the assessments made by the assessor, during these years, were void, because the assessment was of ninety-three miles of the right of way in the aggregate, while but fifty-five miles of right of way was actually taxable, the balance being exempt, yet in the same breath, said, that an assessment of sixty miles of such right of way in the aggregate, when only fifty-five miles thereof was upon property not exempt, was valid. This holding of the territorial Court presents an inconsistency, that ought not to be approved by a Court of this character and standing.

The inequity of the holding by the lower Courts that the facts showing these things alleged in the pleas in bar, were insufficient, in law, to defeat the claims presented, would have been perfectly apparent to this Court, if it had fully understood the questions presented by these pleas in bar, and the ruling thereon by the lower Courts. The proposition, that there were at the time of the levies by the collector the same taxes, levied upon the same identical property, unpaid and still in existence, could not possibly have been urged, or presented to this Court, upon the first hearing of this cause.

FOURTH.

If, as held by this Court in its decision, the Santa Fe Pacific Railroad Company became a party to this suit by filing its petition to have a notice to creditors published, on the 19th day of December, 1898, more than six months after filing of the intervening petition, and nearly six months after its dismissal, it did not become a party to this intervening petition, which had already been dismissed from the case, or a party to it after its reinstatement.

See:

Houston & T. C. Ry. Co. v. Crawford, 88 Tex. 277.
Smith, et al. v. Woolfolk, 115 U. S., 149.
Great Western Tel. Co. v. Purdy, 162 U. S., 329, 336.
Reynolds v. Stockton, 140 U. S. 254.
Gray v. Brignardello, 1 Wall., 627.

FIFTH.

After the overruling of the plea in abatement, the appellants filed a joint and several demurrer to the intervening petition. (Pr. Tr. pp. 132 to 151.) This demurrer contained, among others, the following specific grounds of demurrer:

"2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its

entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

* * * *

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical 33 miles referred to in such assessment can be distinguished from the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition."

In our brief, filed in October, we, in substance, presented the following argument, in support of the grounds of demurrer above set out:

All the property included in the additional assessments was, and is, real estate under the provisions of section 2807 (see Appendix to our Brief) of the Compiled Laws, is settled beyond any question of doubt by the decision of this Court in the case of the Territory of New Mexico v. The United States Trust Company (172 U. S. 171).

Section 2834 (see Appendix to our Brief) provides for the making of an assessment book, or roll, in which are entered the different kinds of property to be assessed, etc.

Section 2835 (see Appendix to our Brief) provides that each tract of land shall be valued and assessed separately, etc.

It will be seen by the sections of the Statutes of New Mexico referred to that the scheme provided for the assessment and taxation of property requires a list in writing made

by the owner, or person in charge of property liable to assessment and taxation; but if the owner is absent, or unknown, and the property is not listed by anyone else, then the assessor himself makes the list.

By the provisions of sections 4035 and 4036 (see Appendix to our Brief), *supra*, omitted property when assessed by either the assessor or collector is to be listed as well as valued. It is perfectly evident that the list of property for assessment, whether made by the owner, person in charge, assessor or collector, must contain such a description of the real estate as is required by the provisions of section 2822.

The statutes referred to are practically copies of the statute in force in Montana, as will be seen by referring to the opinion of Justice Knowles in the case of Powder River Cattle Company v. Board of Commissioners, 45 Fed. 325.

The Supreme Court of Montana, in construing this statute in the case of the N. P. R. R. Co. v. Carland (5 Montana, 146, 3 Pac. Rep. 134), holds that the necessity of the description required by the statute, of real estate, separate and by itself, is a necessary part of the statement, and an assessment of property which does not comply with it is absolutely void. To the same effect is the decision of Justice Knowles above referred to.

This Court in the case of Lyon v. Alley (130 U. S. 177) lays down the rule as follows:

> "When the requisitions prescribed for the assessment and collection of taxes are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory, and must be followed.

Provisions of statutes as to the form and mode of assessments, and the place where the tax lists are to be deposited, are designed for the benefit of the taxpayers and the protection of their property from sacrifice."

See also to the same effect:

French v. Edwards, 13 Wall. 506.

Bird v. Benlisa, 142 U. S. 664.

Van Cise *et al.* v. Carter, 68 N. Y. 539.

The exhibit showing the details of this assessment discloses that there were 93.7 miles of these improvements on the right of way of the railroad company in Valencia county, 33 miles of which were by the statements made in the assessment exempt from taxation, and from the same statements 60.7 miles were not exempt, and that these 60.7 miles of this total mileage which were not exempt were assessed in gross at $394,550. (Tr. p. 63.)

Whether these 60.7 miles that were subject to taxation according to the statements made in this assessment, were together, in a continuous line, or separated by any of the miles that were exempt, does not appear. This assessment was, and is, precisely like an assessment of 63.7 acres of land in a tract of 93.7 acres, without any description to identify any one of the 63.7 acres from any other one of the 93.7 acres. Would it be possible for the owner, or for anyone else, to determine where any one of the 60.7 miles that entered into this assessment was located in the total mileage of 93.7 miles in Valencia county? Was this such a description as the mandatory provisions of the statute required?

As an answer to this question we quote from the decision of the Supreme Court of Nebraska in the case of Johnson County v. Tierney *et al.* (76 N. W. 1090), as follows:

"The assessment and taxation of lot 5 for 1882, and 1883 was under this description: 'Part of lot 5.' This designation, considered by itself, or in connection with the evidence contained in the record before us, furnishes no means by which we can determine, or even conjecture, what portion of the property is charged with the taxes. It was not a fractional lot. It was all owned by the heirs of Mary A. Tierney. It was all subject to taxation, yet only a part of it was taxed. We cannot say what part and therefore hold that the taxes are void. Lessee of Massie's Heirs v. Long, 2 Ohio 287; Lessee of Mathews v. Thompson, 3 Ohio 272; Ronkendorff v. Taylor's Lessee, 4 Pet. 350; Burchard v. Hubbard, 11 Ohio 316; Raymond's Lessee v. Longworth, 14 How. 76; People v. Flint, 39 Cal. 670; Atwell v. Zeluff, 26 Mich. 118; Sims v. Warren, 67 Miss. 278, 7 South 226."

We also quote the first point in the syllabi in the decision of the Supreme Court of Louisiana in the case of Augusti *et al.* v. Lawless *et al.* (14 Southern 228):

"An assessment that does not contain a description sufficient to identify the property assessed is illegal and void, and therefore beyond the healing power of the curative statute of 1884, a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power."

We also quote the third point of the syllabi in the decision of the Supreme Court of Michigan in the case of Jackson v. Sloman, 75 N. W. 282, as follows:

"In assessment proceedings, the description of the land must be sufficiently definite and certain as not to

require resort to extrinsic proof that a particular piece of land was designated."

See, also,

Jones v. Pelham, 84 Ala. 208.

People v. Mahoney, 55 Cal. 286.

Raymond v. Longworth, 14 Howard 76.

Turner v. Yeoman, 16 Ohio 25.

Sims v. Warren, 67 Miss. 278.

People v. Hyde, 48 Cal. 431.

Ainsworth v. Dean, 21 N. H. 400.

Treon v. Emerick, 6 Ohio 391.

Cooley on Taxation, 281.

Jory v. Palace Dry Goods and Shoe Co. (Ore.), 46 Pac. 786.

Van Cise *et al.* v. Carter, 68 N. W. 539.

As before stated, the intervening petition was required to set forth sufficient facts to show that the tax sought to be recovered was a valid and legal tax, which was a lien upon certain real estate, describing it. (See section 4157, Compiled Laws New Mexico, Appendix to our Brief.)

State v. Howard, 80 Ind. 466.

People v. C. P. R. R. Co., 83 Cal. 393.

The collector acting under the authority of section 2848 of the Compiled Laws of 1884 (see Appendix to our Brief) was required "to list, value and assess such property." The requirement that the collector should assess such property after its valuation was a requirement that he should extend the taxes levied against its value.

Savings Bank v. United States, 19 Wall. 227.

People v. Weaver, 100 U. S. 545.

The intervening petition fails to allege any extension of any tax against the valuation of the property. It simply alleged the valuation made by the assessor, and then the rate of taxation which was in force during the year 1892; it nowhere alleged that the collector entered upon the tax rolls any tax against this valuation; hence the third ground of the demurrer should have been sustained.

State v. Perkins, 24 N. J. L. 409.

Seymour v. Peters, 67 Mich. 415.

C. M. & St. P. Ry. Co. v. County of Cossuth, 41 Iowa 57.

Barker v. Early, 33 Mo. 677.

Moon v. March, 40 Kansas 58.

While this demurrer is not specifically mentioned in the opinion, our argument in support of it is probably intended to be answered, by the following statement in the opinion:

> "While the description in the intervening petition of the property sought to be subjected to the taxes may be indefinite, the property is sufficiently described in the decree, and it must be assumed that the testimony warranted the description."

It seems to us, with deference, that we had a right to have the demurrer sustained. The fact that subsequently the Court, from the testimony, found sufficient facts, to make up a clear description, of the property assessed and taxed, would not waive its error in overruling the demurrer, or its further error in finding something not warranted by the issues made in the pleadings.

Teal v. Walker, 111 U. S. 242.

Bauserman v. Blunt, 147 U. S. 652.

SIXTH.

This Court, in determining that it could not consider the facts found, and certified to it, by the Supreme Court of the Territory, upon the question, as to whether such facts supported the judgment of that Court, in so far as that Court determined, that the right of way of the Atlantic & Pacific Railroad, where it crossed certain Spanish grants, was not exempt, but was right of way acquired from private ownership, overlooked, as we believe, not only the record, but the oral argument presented at the hearing by counsel for appellant.

I.

The brief of appellee, which first presented the objection, to the consideration of the findings of the Supreme Court of the Territory, was, as the writer remembers, filed the day this case was called by the Court for hearing. In the oral argument, made by counsel for appellants, at the hearing, there was, in substance, presented to the Court, the proposition; that there were sufficient ultimate facts, found by the Supreme Court of the Territory, (including those ultimate facts stated in the agreed statement of facts) in relation to this matter, to clearly present every question, sought to be presented by appellants, except, perhaps, as to the one question, of the character of some of the grants; that such ultimate facts, from their very nature, could not be modified, or changed, in any way, by the probative or evidential facts, or the evidence, contained in the statement of facts certified by the Supreme Court of the Territory, in addition to such ultimate facts, hence that, under the Act

of April 7, 1874, the Court should consider these ultimate facts, treating the evidential facts as mere surplusage.

Believing that our position was correct, we ask the consideration of it by the Court. To illustrate what we meant:

If the Supreme Court of the Territory should find the facts in any given case, as required by the Act of Congress, and should also attach to such findings, the evidence in the case, the fact, that the evidence appeared with the findings, could not, as it seems to us, affect the jurisdiction of this Court, to pass upon the findings of fact, and their sufficiency to support the judgment.

Again, it having been held several times by this Court, that an agreed statement of facts, adopted by the Supreme Court of a Territory, would answer, for all purposes, the requirements of the Act of April 7, 1874, (Stringfellow v. Cain, 99 U. S. 610; Haws v. Victoria Copper Min. Co., 160 U. S. 303; Apache County v. Barth, 177 U. S. 540) in relation to the findings of fact therein mentioned, it would seem to follow, that where an agreed statement of facts adopted by the Territorial Supreme Court, contains ultimate facts, and evidential facts, or evidence, that this Court would have jurisdiction to, and could, examine the ultimate facts, upon a question of this character, if it would appear that such ultimate facts could in no wise be affected by the evidential facts, or the evidence, contained in the record. In this case, we contend that the facts sought to be presented to this Court on this question, were the facts found by the Supreme Court of the Territory, and acted upon in rendering its judgment. As said by the record (the italics are ours):

"that the said agreed statement of facts sets out the

facts of this case which were heard or considered by this Court upon said appeal, and the same is hereby adopted by this Court *as its statement of such facts* for use upon the appeal aforesaid without here repeating the same." (Pr. Tr. p. 316.)

Thus the Supreme Court of the Territory said, that it not only adopted the agreed statement of facts, but that the facts stated in it were adopted by that Court, "as its statement of such facts for use upon appeal." Upon precisely such a certificate, this Court assumed jurisdiction to determine, and did determine, the case between these parties, reported in 172 U. S. 171.

It seems to us, that this precise question, was determined by this Court in the case of City of St. Louis v. Western Union Telegraph Co. (148 U. S. 92), where the learned Justice, who delivered the opinion in this case, said in that case:

"At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the Court during the progress of the trial. * * It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in Norris v. Jackson, 9 Wall. 125, presents a question of law for our consideration. Further, there was, as also appears in the bill of exceptions, an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based. It is true that, in addition to these agreed facts, there was some oral testimony, but as it appears from the opinion of the Court that it made

a distinct ruling upon a proposition of law not at all affected by the oral testimony, and which in its judgment was decisive of the case, we cannot avoid an inquiry into the matter thus determined. We, therefore, pass to a consideration of such questions as are distinctly presented and clearly involved."

The following *ultimate* facts appear from the record, which the Court will see could by no possibility be changed by anything else in the record, and therefore necessarily were the only facts upon which the determination as to this question was made by the Territorial Court:

"The Atlantic & Pacific Railroad Company named in the intervening petition, was incorporated under the act of Congress, approved July 27th, 1866. That prior to March 12, 1872, the Atlantic & Pacific Railroad Company had definitely located its line of road through the county of Valencia, and on March 12, 1872, it filed in the office of the Secretary of the Interior of the United States a map showing its line of definite location through the Territory of New Mexico. That at the time said company definitely located its line of railroad under said act of Congress, through the county of Valencia, in said Territory, no survey of the lands in that county had ever been made by the government, or by any one else. That the entire right of way of the said railroad company as located through that county, (and at the time of the building of the railroad thereon) was located upon and over land which consisted of high, desert table lands, hills and one or two small valleys. That no part of the right of way at the time when located and built upon passed over any cultivated, enclosed or occupied lands in Valencia county, save and except some small tracts cultivated by the Indians in the Pueblos of Laguna and Acoma, within the limits of such Pueblos. That at the time of the location of said line, and the building of the railroad thereon, there was nothing, so far as the eye could see from any part of the right of way, to distinguish the land over which said line of right of way was located, from

any other wild, uncultivated, uninhabited and unsurveyed lands situated in said county, except where it passed across the two Pueblos referred to and except also that somewhere on each of the grants hereinafter referred to there were persons living who claimed ownership to the exterior boundaries thereof. * * * That the line of railroad referred to as located, built and constructed, passes going from the east to the west through a portion of the county of Bernalillo and across a portion of the county of Valencia, in New Mexico. That upon crossing the line between Bernalillo and Valencia county in going west, this railroad is located and built upon land claimed to belong to two Spanish grants, now known as the Joaquin Sedillo and the Antonio Guiterrez grants. That the grant papers pertaining to each of the above named grants were a part of the archives of the Government of Spain, received by the Government of the United States from Mexico and in the custody of the Surveyor General of New Mexico ever since the organization of his office in 1855, but were never presented to the Surveyor General of the Territory of New Mexico or filed or recorded in any public office in the Territory of New Mexico, except as afore-stated prior to the 9th of September, 1896, when a petition was filed in the office of the clerk of the Court of Private Land Claims, at Santa Fe, New Mexico, by the claimants to the land of each grant separately against the United States. * * * That the right of way going west crosses these two grants in a southwesterly direction, crossing the north and south line of each. That the length of the right of way over these two grants is about 4 miles. That prior to the filing of the petition in the Court of Private Land Claims, as stated, no one, including even the owners of the grants, knew of their existence, except that in the trial of the San Clemente case in the Court of Private Land Claims, the government found and produced, in that case the archives tending to show these two grants. That prior to the decision of the Court of Private Land Claims in this case, no one could have determined where the north and south line of said grants, or either of them, was located, or the width of them, or either of them north and south, except

that the north line was the south line of the previously surveyed and patented Isleta Pueblo grant and the south line was the north line of the San Clemente grant as confirmed by the Court of Private Land Claims. That prior to the decision referred to there never was any segregation of the land contained in these two grants from the public lands of the United States, or from the lands of any one else except as may appear from facts stated herein. That prior to the filing of the petition in each of these cases in the court of private land claims, no officer, agent or servant of the Atlantic & Pacific Railroad Company, or of C. W. Smith, late receiver, or of the United States Trust Company of New York had any actual or constructive knowledge of the existence of either of these two grants, except as may be shown by the facts herein set forth. That upon crossing these grants, said right of way is over a portion of a Spanish grant, known as the 'San Clemente' grant, for a distance of about 10.5 miles.

That the right of way crosses the north, south and west lines of said grant. * * * That prior to the survey made under the decision of the Court of Private Land Claims in this cause, no one could have determined actually, where the line of railroad entered into or passed out of this grant, or how much mileage there was over lands belonging to this grant. That while some portions of this grant were occupied by the owners of interests in it, yet none of the portions covered by the right of way of said railroad company were occupied, or cultivated, and the owners claimed the north line to embrace lands contained in the two grants above stated, and the survey of 1878 was in accordance with that claim. * * * That prior to the decision of the Court of Private Land Claims in this case, it would not have been possible for any one to have actually determined how many miles of right of way of the railroad company was located upon lands covered by this grant, or where the said right of way crossed the exterior lines of this grant. * * * That the right of way crosses from the San Clemente grant into another Spanish grant known as the Nicolas Duran de Chaves grant, crossing the north line of the last named grant a little

ways, and recrossing again into the San Clemente grant; that said right of way is located upon the last named grant, as it is now established, about 2¼ miles, the point of entrance in said last named grant being about twelve miles west from the Rio Grande valley.

That prior to the survey and confirmation thereof, it would not have been possible for any person to have ascertained or determined where the right of way entered and left the lands covered by said Spanish grant. The location of the northern boundary line, which is crossed by the right of way, both in going into the grant and in coming out, was always a matter of dispute between the parties claiming this grant and the owners of the grant lying to the north.

That the point where the right of way crosses the northern line of this grant going west, is about twelve (12) miles distant from the Rio Grande valley, where the settlements upon this grant were, and that that portion of the lands of the grant covered by the right of way was and is and always has been a sandy desert tract of high table land, uninhabited and unoccupied.

That the right of way of said railroad company on going west on crossing the west line of the San Clemente grant, crosses a small piece of public land and then crosses in a northwesterly direction the south and west lines of a Spanish grant known as the Antonio Sedillo or Canada de los Apache grant; that the length of the right of way over the land contained within the exterior limits of this grant is thirteen miles; that the history of this grant is as follows:

The grant was executed in 1769. The petition was filed in the office of the Surveyor General of New Mexico on April 6th, 1871. On November 6th, 1871, The Surveyor General reported to the Interior Department, approving the grant. In April, 1872, the report of the Surveyor General was transmitted to Congress, and on October 11th, 1886, a supplemental report was made by the then Surveyor General recommending the rejection of the claim, and on November 24th of that year this report was transmitted by the Surveyor General to the Commissioner of the General Land Office. In September, 1877, a preliminary survey was made

under the direction of the Surveyor General, which shows the grant, except as to the north boundary, just as subsequently confirmed by the land court. On December 6th, 1887, the supplemental report of the Surveyor General recommending the rejection of the claim, was transmitted to Congress. * * * That the survey of said grant, made under and in pursuance of the decision of the Court of Private Land Claims, has not yet been approved; that where the right of way crosses this grant, at the time of its location, and ever since that time, the lands were uninclosed, uncultivated and unoccupied, and consisted entirely of high desert lands, with nothing to distinguish the lands of the grant from the public lands of the United States.

That, outside of the statement herein contained, there has been no segregation of this grant from the public domain; and the officers of the railroad company, of the receiver and of the United States Trust Company had no more knowledge of this grant than they had of any of the others, as herein stated.

That, prior to the determination by the Court of Private Land Claims, it would not have been possible to locate the exterior lines of said grant, except as the preliminary survey may have shown them.

That neither the Atlantic & Pacific Railroad Company nor its receiver or assigns, have acquired by purchase or by condemnation any portion of the right of way over the lands contained in the last named grant. * * * That after crossing a portion of the grant last referred to, the right of way crosses for two Spanish leagues a grant confirmed by the Court of Private Land Claims sitting at Santa Fe, New Mexico, and known as the Laguna Pueblo. It crosses this grant from east to west and for a distance of 6 1-2 miles.

That when the right of way was located, and from that time since, it passed around a hill on which the village of the pueblo was, and since has been, located. * * * That from the west line of the pueblo, as fixed by the Court, the right of way passes over about two Spanish leagues of public land and then again crosses from east to west the lands heretofore referred to as the Laguna Indian Pueblo Tracts.

That the general characteristics of the country crossed by the right of way in passing from the east line of tne Laguna Indian Pueblo Tracts to the final west line of the same tracts is the same as heretofore described, with the exception that in several places small portions of land included within each of the grants last referred to as crossed by the right of way, were long prior to the location of said line, and ever since said date have been cultivated, though not inclosed, by the Indians of Laguna. * * * That the officers and agents of the railroad company and the receiver had no other or further knowledge concerning these last named grants than they had concerning any of the other grants herein referred to, except such as would be derived from the settlement and cultivation of these grants by these Pueblo Indians, as stated, and that no segregation except as herein stated, of the lands of this grant from the remainder of the public domain was ever made until the decision of the court referred to, and until that decision, it would have been impossible to have located the same.

That the right of way after crossing the west line of the last Indian Pueblo Tracts, crosses over lands contained in the Spanish grant known as the Acoma pueblo; that the land over which the right of way crosses in this grant is of the same general character as those contained in the other grants; that the Indian pueblo of this grant is out of sight from any point on the right of way; that there was some small acreage cultivated by the Indians, but not enclosed, over which the right of way was located. The right of way over this grant is 12 1-4 miles in length.

That an application for this grant was filed in the office of the Surveyor General of New Mexico, March 3; 1856, and that the application, with the recommendation of the Surveyor General was transmitted to the Commissioner of the General Land Office, September 30th, 1856, and was confirmed by Congress by act of December 22nd, 1858. * * * That the survey of this pueblo was made in March, 1877, and June 5th, 1877, it was approved, and November 19th, 1877, a patent was issued.

That none of the officers or agents of the railroad company, or the receiver ever had any further or other information concerning the boundary lines of this grant than they had of any other of the grants referred to, except the further fact that they had knowledge that there was some cultivation by the Indians, and also of the existence of the pueblo village. That until this survey was made no one could have located the exterior lines of this grant accurately."

(Pr. tr. pp. 212, 213, 217, 227, 232, 252, 253, 258, 259, 268, 273, 274, 276, 277.)

The Supreme Court of the Territory made, upon the other facts, disclosed by the record, in connection with these Spanish grants, the following findings:

"That the line of road, the improvements upon which were assessed by the collector aforesaid, runs through Spanish grants as follows: Through the Joaquin Sedillo and Antonio Guiterrez grants for a distance of four miles; through the San Clemente grant for a distance of ten and one-half miles; through the Nicolas Duran de Chaves grant for a distance of two and one-quarter miles; through the Antonio Sedillo grant for a distance of thirteen miles; through a portion of the Laguna purchases for a distance of seven miles; through the Laguna pueblo grant for a distance of six and one-half miles, and through the Acoma Pueblo grant for a distance of twelve and one-quarter miles, making a total of fifty-five and one half miles; that of said grants the Laguna purchases were confirmed by Congress in 1860, the Acoma Pueblo grant was confirmed by Congress in 1858, and each of the other grants has been confirmed by the Court of Private Land Claims, which court, in each case, declared the title to have been complete and perfect at or before the time of the acquisition of sovereignty by the United States over the country embraced within the present Territory of New Mexico, and that all such confirmations have become final."

It will be seen that the ultimate facts hereinabove copied

and adopted as the findings of fact, by the Territorial Supreme Court, and its express findings, disclose: That the right of way crossed certain Spanish grants, which the Court of Private Land Claims determined were perfect grants, at or before the time of the acquisition of the territory by the United States; that no one of these Spanish grants was segregated from the public domain at the time of the definite location of the right of way over the same; that at the time of the definite location of the right of way over these grants, no one of the grants, or any other portion of the public domain in Valencia county, had been surveyed by the United States government, or by anybody; that there was nothing to indicate or show where these grants, or either of them, were situated, or where the lines of either of such grants were; that the Atlantic & Pacific Railroad Company, and its officers, in making its definite location across these grants, having no knowledge of the existence of these grants, or either of them, assumed that the lands over which the line was located were public lands of the United States; that the portion of these grants covered by the right of way was not occupied, or in the possession of anyone, and presented the same character of desert that the balance of the surrounding country presented, except as to some tracts of land cultivated by the Indians; that the railroad company never purchased, or acquired in any way, any title to any of the land covered by its right of way in Valencia county, save and except the title conveyed to it by the second section of its grant, upon the definite location of such line of right of way; that the only evidence of the fact that any of these grants were Spanish grants is contained

in the decision of the Court of Private Land Claims, which could only be binding between the claimants before the Court and the United States government.

Upon these facts we call the Court's attention to the argument and authorities in our brief, filed in October, commencing on page 104, to page 110, and pages 115 to 125. It is clear that the Supreme Court of the Territory largely based its judgment upon judgments of the Court of Private Land Claims as being conclusive as to third parties, hence with the decision of this Court in City of St. Louis v. W. U. Tel. Co., *supra*.

If the ultimate facts presented in this record were not sufficient facts to be considered (and it is apparent that they are the facts upon which the Supreme Court of the Territory based its judgment) this Court, instead of refusing to consider the same, should award a *venire facias de novo* to the Supreme Court of the Territory, on the authority of Chesapeake Ins. Co. v. Stark (6 Cranch, 268); Livingston v. Maryland Ins. Co. (6 Cranch, 274); Barnes v. Williams (11 Wheat. 415); Saltonstall v. Birtwell (150 U. S. 419), and cases therein cited.

SEVENTH.

The judgment of the Supreme Court of the Territory, determining that its judgment was a lien upon specifically described portions of the right of way, was erroneous, because of the fact that there was no allegation in the intervening petition alleging that the taxes were a lien upon any specific portion, or on any portion of the property described, or of the entire right of way. It is true that the prayer of the petition asked that the total amount of taxes might be decreed to be a lien upon the property of the railroad company in the hands of the receiver, but it did not describe the property referred to, and at that time, as said by the Court in its opinion, the right of way itself was held by the receiver as the agent of the purchasers, and not as receiver. The general prayer for relief, it seems to us, should not be held to be broad enough to cover a decree of a specific lien on specific portions of the right of way of the railroad company.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellants.

E. D. KENNA,
ROBERT DUNLAP,
of Counsel.

I, Robert Dunlap, of counsel for the Appella
herein, do hereby certify that in my judgment the
going petition for a rehearing is well founded a
the same is not interposed for delay.
(Signed) Robert Dunlap